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IN THE

Supreme Court of the United States

October Term, 1942.

No. 814

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the Estate of New Wells Market, a copartnership consisting of Shoo Hoo Kim Ying, *et al.*,

Petitioner,

vs.

SUN H. TOM,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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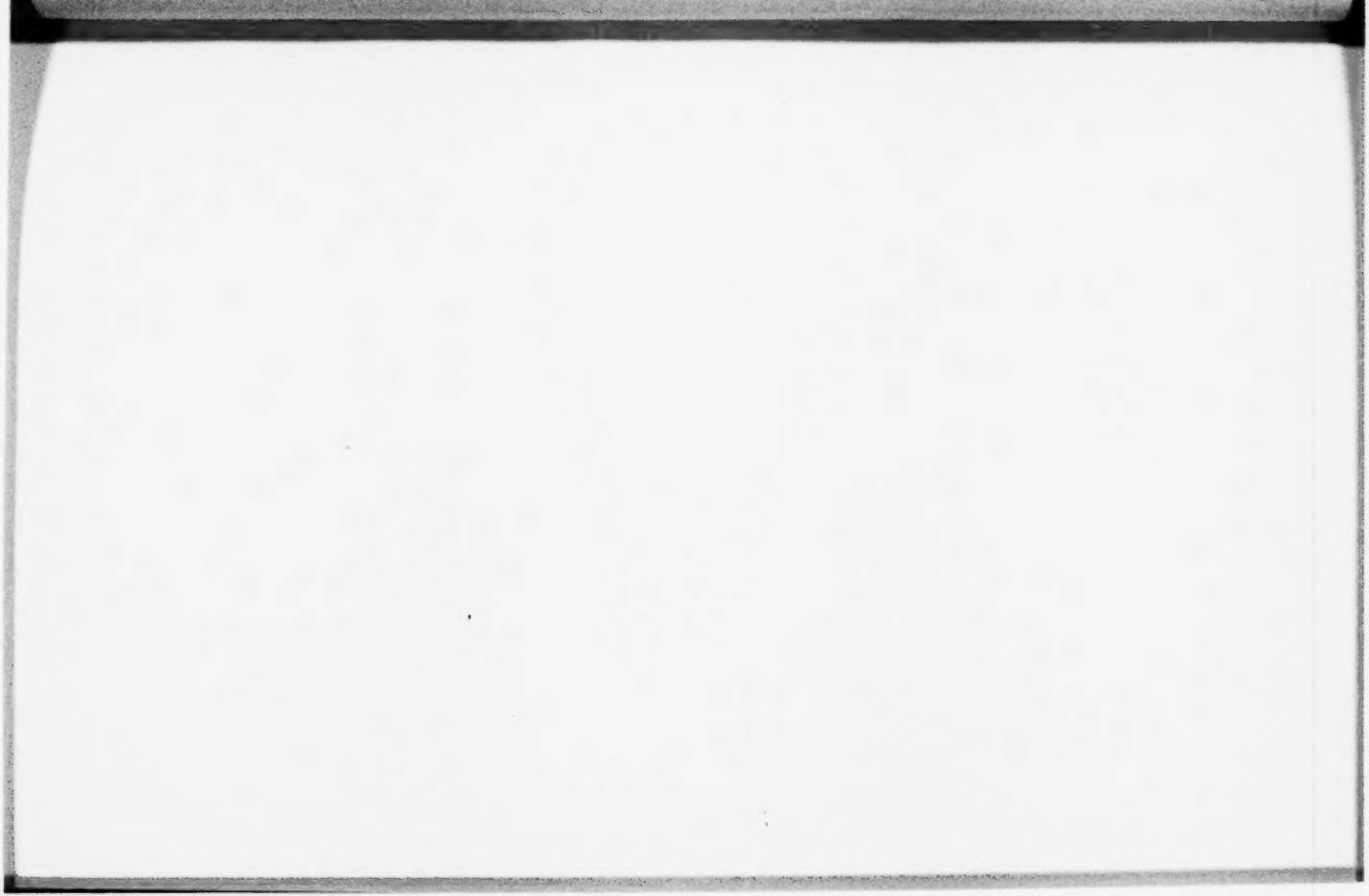

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Reference to Official Reports and Statement of Grounds for Jurisdiction.

The Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals is brought before this Court under the provisions of Section 24-c of the National Bankruptcy Act (11 U. S. C. A., Section 47-c), and Section 240 of the Judicial Code (28 U. S. C. A., Section 347).

The jurisdiction of the District Court was invoked under the provisions of Sections 60-b and 67-d of the National

Bankruptcy Act (11 U. S. C. A., Sections 97-b and 107-d), in an attempt to avoid an alleged preferential and fraudulent transfer of the assets of a bankrupt copartnership.

The judgment and decree of the District Court was entered on March 31, 1942. [Tr. p. 38.]

Thereupon the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit was invoked by Sun H. Tom under the provisions of Section 24-a of the National Bankruptcy Act (11 U. S. C. A., Section 47-a).

The Order of the Circuit Court of Appeals for the Ninth Circuit, reversing the judgment and decree of the District Court was entered on November 30, 1942. [Tr. pp. 275, 276.]

A petition for rehearing was filed by Paul W. Sampsell, Trustee, and was denied by the said Circuit Court of Appeals on December 17, 1942. [Tr. p. 279.]

The Opinion of the Appellate Court will be found in 131 Fed. (2d) 779, and in the Transcript of Record at pages 276 and 277.

Petition Does Not Fall Within the Provisions of Supreme Court Rule No. 38 (5-b).

The Petition for Writ of Certiorari asserts (page 3) that this cause involves a question of far-reaching importance to mercantile and business interests of the country, *on which the Circuit Courts of Appeal are at variance, and involves a unique construction of the partnership provisions of the National Bankruptcy Act by the United States Circuit Court of Appeals for the Ninth Circuit.* (Italics ours.)

This premise is incorrect. The decision of the Circuit Court of the Ninth Circuit is in accord with the decisions of the Supreme Court of the United States, and with all other Circuits in which the point has been passed upon, to-wit:

Francis v. McNeal (C. C. A. 3rd Circuit), 186 Fed. 481, at 484. Affirmed 228 U. S. 695, 57 L. Ed. 1029;

Baker v. Bates Street Shirt Co. (C. C. A. 1st Circuit), 6 Fed. (2d) 854, at 858;

In re Fuller (C. C. A. 2nd Circuit), 9 Fed. (2d) 553-4;

Tumlin v. Bryan (C. C. A. 5th Circuit), 165 Fed. 166;

Vaccaro v. Security Bank (C. C. A. 6th Circuit), 103 Fed. 436, at 441 to 444.

Counsel for Petitioner cites the case of *Rosenberg v. Semple*, 257 Fed. 72 (C. C. A. 8th Circuit), as being opposed to this general rule. However, a reading of that case will show first, that it has nothing to do with a partnership bankruptcy, and second, that it merely reiterates the well-known policy of Courts of Appeal not to disturb findings made upon conflicting testimony. It certainly has no bearing on the instant case, and cannot, by the greatest stretch of the imagination, be said to be at variance with the decision of the Ninth Circuit Court or of the other Circuit Courts above mentioned. So, we respectfully submit that if the Supreme Court follows the usual practice as outlined in Supreme Court Rule No. 38 (5-b), the Petition for Certiorari should be denied.

Correction of Inaccuracies and Misstatements of Evidence in Petitioner's Petition for Writ of Certiorari.

There are misstatements of the evidence which we feel should be pointed out. For instance, at page 7 of the Petition, the statement is made that:

> "To make the situation even more crucial, a meeting of creditors was called on July 5, 1941, which was attended by York K. Poon, the manager, and Shoo Hoo Kim Ying. They were informed at that meeting that the store was going to be closed the next day. [Tr. pp. 98, 99.] The partnership had theretofore been placed on a C.O.D. basis by creditors." [Tr. pp. 101, 102.]

This statement is without foundation. There was no meeting of creditors on July 5th, 1941. There was a meeting of creditors on July 1st or 2nd, 1941, at which York K.

Poon and Shoo Hoo Kim Ying were present. [Tr. p. 202.] They were not informed at that meeting that the store was going to be closed; instead, it was agreed between the copartnership and the creditors that the old debts would be frozen, and that the copartnership should go on a C. O. D. basis commencing the following Monday, and that the copartnership was to continue business on that basis. [Tr. pp. 202, 203.] The first intimation that the copartnership might not be allowed to so continue business on a C. O. D. basis, came about July 5th, 1941, and such intimation did not come from the creditors, but came in an indirect manner when Shoo Hoo Kim Ying went out to collect accounts receivable in the usual manner, and was informed by several debtors of the copartnership that they would not pay for the reason that they understood the packers were going to put a Receiver in charge of the market. [Tr. pp. 98, 99, 103, 112, 113, 132.]

Again, on page 8 of the Petition the statement is made that:

> "A conference was held on the evening of July 5, 1941, which resulted in the disbursal of funds on hand * * *".

This is another statement not supported by the record. The testimony of Sun H. Tom [Tr. pp. 129, 130, 131, 132] shows that there was no conference held, but that the only thing that happened was that the Managing Copartner, Shoo Hoo Kim Ying, brought in certain collections, ordered Sun H. Tom the bookkeeper to enter them in the books, and then called in York K. Poon, the Manager of the store, and told him that the packers had "double-crossed" him, and that he should take the money and pay off the employees.

Again, on page 8 of the Petition, the statement is made that:

> "The judgment of the District Court was reversed *solely* (italics ours) on the ground that the Trustee had failed to prove insolvency on July 5, 1941".

This statement is incorrect also. The judgment was reversed on *three* grounds, to-wit: (1) no proof of insolvency; (2) no proof that Sun H. Tom entered into a conspiracy; and (3) no proof that the payments were made pursuant to a conspiracy. [See the last paragraph of the Opinion of the Circuit Court, Tr. p. 277.]

Correction of Inaccuracies and Misstatements of Evidence in Petitioner's Brief, and Argument Thereon.

The inaccuracies and misstatements continue on into the Petitioner's Brief. On page 11 of the said Brief, the statement is made that the partnership consisted of nine Chinamen. The true fact is that there were eleven co-partners.

Then, on page 12, there is a statement made which is not borne out by the record. Counsel for Petitioner says (p. 12 of his Petition and Brief):

> "The Trustee put an adjuster in his office to work seeking to locate *assets* (italics ours) of these individual copartners * * *." [Tr. pp. 85, 86.]

This statement is contrary to the record. A reading of said pages of the record indicates clearly that all the Trustee did was to turn the marshalling order over to one of his adjusters to try to locate the partners, and that he was not able to find them. Counsel for Sun H. Tom

questioned at length to try to find out just what was done to ascertain what property the individual partners had [Tr. pp. 84 to 86, incl.], and it is apparent that all the Trustee did was to turn the matter over to an adjuster to try to locate the partners, and the adjuster could not find them. We quote from the Transcript, pages 85 and 86:

> "Q. By Mr. Gardner: Then do I understand, Mr. Sampsell, that all that was done in the matter of trying to get any assets from these partners is that you turned the matter over to an adjuster? A. To the adjuster, to try and locate them. And he reported back to me that he couldn't locate them.
>
> Q. He couldn't find them? A. That is right.
>
> Q. He couldn't locate these Chinamen? A. That is right; he couldn't locate these Chinamen."

There is no proof that he searched for property; there is no proof that the partners individually did not have property. The mere getting of the marshalling order itself is not sufficient, particularly in this case, where it is evident from the order itself that it was obtained upon a published summons, and the partners had no actual notice of the proceeding. [Tr. pp. 45, 46.]

Then, again, on page 13 of the Petition and Brief, Counsel for Petitioner makes statements to the effect that York K. Poon testified [Tr. pp. 91 *et seq.*] that he did not know of any property that the individual partners had. Such statements may be misleading. A reading of the testimony of York K. Poon [Tr. pp. 91 to 94, incl.] shows that what York K. Poon really said was that he did not know whether the various partners had property or not; not that he knew of no property that any of them had. We think there is considerable difference in the meaning

of the two statements. The first indicates a lack of knowledge as to whether or not the copartners did or did not have property; the latter would indicate a definite knowledge that he knew they had no property. What York K. Poon testified was, in effect, that he had no knowledge either way, and such testimony on his part would have no bearing on the question of fact as to whether the partners did have property. It would neither prove nor disprove, and certainly could not be used by the Petitioner here as proving a *prima facie* case. The mere fact that York K. Poon did not know whether or not they had property, is no proof that they did not have property. Insolvency is certainly not presumed. And if any presumption is to be drawn in the matter, the fact that the partners could not be located would more likely indicate that they did have property which they were reluctant to see fall into the Trustee's hands, rather than that they did not have property.

It all boils down to this: That it was a difficult task to prove that the copartners themselves did not have property, and that therefore, since it was difficult, the Court should excuse his failure to prove this absolutely essential element of his case, and give him judgment anyway. You might as well say that in a murder case, where it is essential to prove the corpus delicti, the State could fail to prove the corpus delicti and say, "Well, it was too difficult to prove, but let's hang this defendant anyway, on general principles!"

Petitoner's Analysis of Items of Store and Equipment Account and Good Will Account Is Fallacious.

From page 15 to page 20 of his Brief, Counsel for Petitioner devotes considerable time in trying to show that the copartnership standing alone, was insolvent as of July 5th, 1941. However, the only evidence tending to show what assets and liabilities the copartnership itself had, at any time near to July 5th, 1941, was the evidence of S. Marks, the auditor for the Assignee, who made an audit as of July 5th, 1941. [Tr. pp. 75, 76, 210 to 214, incl.] This audit showed a net worth of $3,898.79. [Tr. pp. 76, 212, 213.] True, there was included as an asset an item of $21,000.00 of goodwill, which perhaps in view of the assignment had no value; however, it also included as a liability the notes owing to Sun H. Tom, carried on the books at $27,059.00 [Tr. pp. 32, 66], of which approximately $22,000.00 consisted of bonuses [Tr. pp. 32, 231, 232], which were illegal and void under the California Usury Law, and could not therefore be considered as a legal debt; so, even if the goodwill of $21,000.00 had no value, it was more than balanced by the fact that approximately $22,000.00 of the alleged debts were in fact illegal and void and could not be enforced. There appears to be no doubt but that the bonuses were void and uncollectible under the California law. We cite the following:

Jones v. Dickerman, 114 Cal. App. 357, at 361-2;

Babcock v. Olhasso, 109 Cal. App. 534, at 537;

Layport v. Rieder, 94 Pac. (2d) 96, at 98;

Layport v. Rieder, 37 Cal. App. (2d) 742, at 747;

French v. Mortgage Guarantee Co., 16 Cal. (2d) 26, at 32;

Penziner v. West American, 10 Cal. (2d) 160, Syls. 4 to 15.

If, therefore, the sum of approximately $22,000.00 of the so-called debts of the copartnership, were not in fact legal or enforceable debts, then such illegal and unenforceable debts cannot be considered in determining the amount owed by the copartnership.

Tennessee Co. v. Thompson (C. C. A. 6th Circuit), 278 Fed. 597, at 601;

LeSueur v. Manufacturers Finance (C. C. A. 6th Circuit), 285 Fed. 490, at 498.

So, if such $22,000.00 was not an enforceable debt, then the copartnership in fact owed $22,000.00 less than the amount shown in Mr. Marks' financial statement, and even if the good-will of $21,000.00 was entirely eliminated, there would still be a net worth of over $3,000.00.

And as to Counsel's contention that because the "Store and Equipment Account" included the bonuses to Sun H. Tom, it was fictitious and should not be counted as an asset but as a liability, the fallacy of this contention lies in the fact that such an assumption fails entirely to take into consideration the undisputed fact that the copartnership did have equipment and fixtures which had cost approximately $30,000.00 about two years previous [Tr. pp. 180 to 184, incl.], and that the only place on Mr. Young's audit where this equipment is shown is in the "Store and Equipment Account" [Tr. pp. 166, 167], and that the Trustee in Bankruptcy himself valued this equipment at $25,926.03. [Tr. p. 70.] We must bear in mind that we are not concerned with whether the books of the copartnership were kept in the ordinary and established way or not; we are concerned with the actual fact of solvency or insolvency. As a matter of fact, the method of keeping

the books was far from orthodox. If they had been kept in the proper manner, the "Store and Equipment Account" would have reflected the $30,000.00 worth of fixtures and equipment, less two years' depreciation, and the bonuses of Mr. Tom would have been set up as "Deferred Interest", or some such heading. However, no matter how the books were kept, we think the Court should take into consideration the fact that it is undisputed that the copartnership did own fixtures and equipment which two years previous had cost approximately $30,000.00, and that the only place in Mr. Young's audit where there is any reflection of fixtures and equipment is in the "Store and Equipment Account". [Tr. pp. 166, 167.] Therefore, there is no merit in Counsel's argument that the "Store and Equipment Account" was a fictitious account and should not be counted as an asset.

As for the matter of the value of the good-will, it would seem that $21,000.00 is not an exorbitant figure to set for good-will in a going business that has carried on successfully for ten or eleven years [Tr. pp. 95, 107], doing a gross business of approximately $400,000.00 per year [Tr. p. 238], and with an average annual profit of between $5,000.00 and $10,000.00 [Tr. pp. 236, 237], even though the business only made a profit of $432.07 during the last year of its existence. [Tr. p. 48.] As we pointed out heretofore, however, if we eliminate the void and uncollectible bonuses (which of course must be eliminated as a liability because under the California law they were void and uncollectible), then the copartnership itself was still solvent even though the item of good-will is valued at nothing.

Test of Insolvency Used by Circuit Court Is Not at Variance With Other Circuits or the Supreme Court.

On page 20 of his Petition, Counsel states that the test of proof of insolvency laid down by the Circuit Court of the Ninth Circuit is unreasonable and contrary to the rule laid down in the case of *Rosenberg v. Semple,* 257 Fed. 72. The test laid down by the Circuit Court of the Ninth Circuit was the same test laid down in the cases of *Francis v. McNeal, Baker v. Bates Street Shirt Co., In Re Fuller, Tumlin v. Bryan,* and *Vaccaro v. Security Bank,* heretofore cited herein. It is the only test that can be laid down in a partnership case. The case of *Rosenberg v. Semple* is not in point because it had nothing to do with a partnership, and a careful reading of it discloses that the only thing it decides is to once again lay down the rule that where there is a *conflict* of testimony the Appellate Courts will not disturb the findings of the lower court in regard thereto. In the case at bar, there was no *conflict* of testimony; there was a complete *lack* of testimony as to the absolutely essential point of whether or not the individual partners had property. There was nothing from which even an inference could have been drawn by the District Court that the individual partners had no property.

The Case of Wight v. Rolffs Is Not in Point Because Based on a Special California Statute Defining Insolvency Differently Than the Definition Used in Bankruptcy.

On page 22 of the Petition and Brief, Counsel cites the California case of *Wight v. Rolffs,* 48 Cal. App. (2d) 696. Counsel quotes at length from said case. But that case was one brought under special Code provisions of the State of California, wherein a special definition of insolvency is given which is different from the definition of insolvency as used in bankruptcy matters. We call the Court's attention to the following quotation from the case of *Wight v. Rolffs,* at page 699:

> "Section 3450 of the Civil Code declares: 'A Debtor is insolvent, within the meaning of this title, when he is unable to pay his debts *from his own means, as they become due*' (italics ours). In determining the issue of a Debtor's solvency under said Section, in cases of this kind, it is held that only such assets as are subject to Court process at the time of the making of the alleged fraudulent conveyance may be considered; and that even though 'A man controlling property out of which he may voluntarily pay his debts if he will, but which for any reason cannot be reached by process of law and thus without his consent subjected to such payment, is nevertheless insolvent.' "

The case of *Wight v. Rolffs* is brought under a special section of the California Code, which defines, for the purposes of actions brought under said sections, insolvency in a way which is different from the definition of insolvency

used in ordinary bankruptcy matters. The State conception of insolvency follows the old equity definition; in Bankruptcy, the test is different (Bankruptcy Act, Sec. 1 (19), viz:— the assets at a fair valuation are insufficient to pay the debts. That case has no bearing on any situation not brought with the purview of those particular Code provisions.

No Proof of Any Intent to Hinder, Delay or Defraud Creditors, so Cases of Dean v. Davis and Brainard v. Cohn Not in Point.

On page 25 of his Brief, Counsel states that the Circuit Court lost sight of the fact that the transaction was attacked not only as a preference, but also as a fraudulent conveyance under the provisions of Section 67-d, Subd. (2) of the Bankruptcy Act. He quotes from said section at some length, but does not quote the equally binding portion of said Section 67-d, contained in Subdivision 1 (d), which reads as follows:

> "A person is 'insolvent' when the present fair salable value of his property is less than the amount required to pay his debts; *and to determine whether a partnership is insolvent, there shall be added to the partnership property the present fair salable value of the separate property of each general partner in excess of the amount required to pay his separate debts.* * * *"

It seems apparent that the Circuit Court did not overlook the fact that the transfer was attacked as a fraudulent

conveyance; otherwise, the Circuit Court would not have stated as it did, in its Opinion [Tr. p. 277]:

> "* * * Nor was there any proof that he entered into a conspiracy, or that the payments were made pursuant to a conspiracy."

The Circuit Court considered that phase of the case, and determined that not only was there no proof of insolvency, but that also there was no proof of any conspiracy. This being so, the cases of *Dean v. Davis* and *Brainard v. Cohn*, cited by Counsel for Petitoner, have no bearing.

Sun H. Tom Not a Fiduciary, and Not a Party to Any Conspiracy.

Counsel contends at pages 30 and 31 of his Brief, that Sun H. Tom was a fiduciary. There is no evidence to support such a contention. Tom was only an employee, to-wit, the bookkeeper [Tr. pp. 95, 108, 123, 190], and a large creditor because of loans made. He took his orders from York K. Poon, the Manager, and Shoo Hoo Kim Ying, the Managing Partner. [Tr. p. 108.] He had no part in the distribution of the money on the evening of July 5th, 1941, and such distribution was made by York K. Poon, the Manager, at the order of Shoo Hoo Kim Ying, the Managing Partner. [Tr. p. 131.] Tom was paid $1,246.28 to apply on the moneys owed to him. [Tr. p. 32.] After crediting this amount, the copartnership still owed him $5,219.00 from moneys actually loaned. [Tr. pp. 230, 247.] Tom had nothing to say as to how

the money was paid out. All he did was to take the amount which York K. Poon and Shoo Hoo Kim Ying decided to pay him to apply on his notes. He was not a joint *tort feasor* with York K. Poon and Shoo Hoo Kim Ying. His only sin was that he was paid something on account of the just debt owing to him. Bear in mind that he received nothing on account of the bonuses, and that the copartnership still owes him $5,219.00 of cash money actually advanced to them by him. There was no evidence that he was a party to any conspiracy, or that he had any intent to hinder, delay or defraud anybody. The Circuit Court so concluded when it rendered its opinion [Tr. p. 277] that not only was there no proof of insolvency, but that there was no proof that Tom entered into any conspiracy, or that the payments to him were made pursuant to any conspiracy.

We therefore submit that the Petition for Writ of Certiorari should be denied.

March 22, 1943.

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